No. 89-852

In The

Supreme Court of the United States

October Term, 1989

EMMA TAYLOR, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION, et al.,

Respondents.

GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Eleventh Circuit joined the First and Tenth Circuits, and held that federal law impliedly preempts a state common-law claim that a car is defective because it is equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. Three state appellate courts, and a host of trial courts, are in accord with the Eleventh, First, and Tenth Circuits. Should this Court review the Eleventh Circuit's decision?

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INTRODUCTION

The Eleventh Circuit held that federal law preempts Petitioners' common-law claim that a car is defective because it is equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. The decision is in accord with the decisions of three state and two other federal appellate courts, and dozens of trial courts all across the country. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989); *Nissan Motor Corp. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (Cal. App. 1989); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988),

appeal dismissed, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988); *Pokorny v. Ford Motor Co.*, 714 F. Supp. 739 (E.D. Pa. 1989) (on appeal to Third Circuit); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Heftel v. General Motors Corp.*, 1988 Westlaw 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988); *Howard v. American Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 11,955 (S.D. Tex. July 6, 1988); *Bass v. General Motors Corp.*, 1987 Westlaw 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 Westlaw 18670-71 (D. Ariz. 1986).[1] Those cases are plainly right,

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[1] In addition to the published decisions, dozens of unpublished decisions hold airbag claims preempted. *See* Wood Opposition, pp. 17-18 n.12. A few trial court cases disagree; but the two contrary published decisions are not on point (*see* Wood Opposition, p. 20 n.14), and the unpublished decisions are old and mostly superseded. *See* Brief in Opposition to Petition for Writ of Certiorari, *Kitts v. General Motors Corp.*, No. 89-279 (pending) ("Kitts Opposition"), pp. 20-22. One intermediate appellate court in Pennsylvania recently held

(Continued on following page)

under settled principles laid down by this Court. *See* Brief in Opposition to Petition for Writ of Certiorari, *Wood v. General Motors Corp.*, No. 89-46 (pending) ("*Wood* Opposition"), pp. 11-15.

This is not the first time the Court has been asked to address the issue. Last term, the Court declined to review a decision of the Minnesota Court of Appeals, the first appellate court to address the issue, finding airbag claims preempted. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988). Since then, petitions for certiorari have been filed in *Wood v. General Motors Corp.*, No. 89-46, and *Kitts v. General Motors Corp.*, No. 89-279, seeking review of similar decisions by the First and Tenth Circuits. General Motors filed oppositions to those petitions on August 25, 1989 and September 18, 1989, respectively. On October 2, 1989, the Court invited the Solicitor General "to file a brief expressing the views of the United States." No brief has yet been filed.

There is no reason to grant review, and the petition should be denied.

(Continued from previous page)

against preemption. *Gingold v. Audi-NSU-Auto Union AG*, Nos. 2058-59 (Pa. Super. Dec. 6, 1989) (application for reargument *en banc* pending). Audi has sought further review through the Pennsylvania courts. Thus, *Gingold* creates no conflict as contemplated by the rules of this Court. *See* Supreme Court Rule 17 (review appropriate where "a state court *of last resort* has decided a question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals") (emphasis added).

REASONS FOR DENYING THE WRIT

Petitioners "adopt the Reasons for Granting the Writ" in the *Wood* and *Kitts* petitions.[2] Petition at 5. General Motors' briefs in those cases explain why review of the airbag preemption issue is unwarranted. Rather than burden the Court with a repetition of the arguments, like Petitioners, General Motors adopts its briefs in those cases.

We will, however, respond to the two arguments separately made by Petitioners. First, a presumption against express preemption does apply, and calls for clear evidence of preemptive intent before a federal regulation will divest states of any authority to regulate an area. However, contrary to Petitioners' argument, where state law directly conflicts with federal law, the state law falls by "direct operation of the supremacy clause." In that

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[2] Petitioners say that "the court of appeals [here] rejected the rationale of the majority in *Wood* . . . , instead upholding the clear and explicit language of the Safety Act in § 1397(c), wherein Congress provided for continuation of common law liability notwithstanding compliance with the minimum motor vehicle safety standards." Petition at 4. This is nonsense. Apart from Petitioners' mischaracterization of § 1397(c), *Taylor* and *Wood* agreed with respect to its effect. Both rejected express preemption. *Wood*, 865 F.2d at 402; *Taylor*, App. 15a-16a, 875 F.2d at 825 & n.18. Both held, however, that § 1397(c) does not expressly save airbag claims, and went on to find that airbag claims directly conflict with federal law, and so are impliedly preempted. *Wood*, 865 F.2d at 402, 412-14; *Taylor*, App. 15a-16a, 875 F.2d at 825 & n.18, 827-28 n.20 ("we reject the appellants' argument that that the Safety Act's Saving's Clause forecloses a finding of implied preemption").

case, the Constitution provides the rule and there is no place for presumptions.

Second, Petitioners for the first time address *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141 (1982), and mischaracterize it. The Court's decision there applies here, squarely.

In sum, Petitioners have have identified nothing that calls for review. Certiorari should be denied.

A. This Court's Decisions Are Clear That Where State Law Directly Conflicts With Federal Law, The Supremacy Clause Commands That The State Law Must Yield, And There Is No Place For Presumptions.

Petitioners say the "presumption against preemption" should apply "in analyzing whether there is implied preemption." Petition at 6. Whether or not that is true where the issue is whether federal law "occupies the field" (not an issue here), it is certainly not so where, as here, a state law directly conflicts with a federal law. A state law that directly conflicts with a federal law "is preempted by direct operation of the Supremacy Clause," *Brown v. Hotel & Restaurant Employees and Bartenders Int'l. Union*, 468 U.S. 491, 501 (1984); presumptions have nothing to do with it. That is the rule regardless of the importance to the state of its own law.

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.

Free v. Bland, 369 U.S. 663, 666 (1962). *Accord Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 2306 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (citation omitted).

The court of appeals in this case simply followed that rule:

> [I]n contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights.

App. 19a-20a, 875 F.2d at 826 (*citing Free* and *Felder*).

Petitioners say that the presumption should apply to direct conflict cases anyway, because, they say, the "purpose and effect of preemption is the same regardless of whether it is express or implied." Petition at 7. That misses the point. The issue is not the effect of preemption, but the effect of the state law.[3] Where the state law does not conflict with federal law, express preemptive intent may be required, and the presumption against preemption ensures that the express intent is there. However, where, as here, there is a "direct conflict" between state

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[3] As to purpose, express preemption permits Congress to judge in a given instance the proper scope of a state's role. Implied preemption preserves the inherent supremacy of federal law over state law where the two collide.

and federal law, no express intent to preempt is necessary; the supremacy clause automatically dictates that the conflicting state law rule must yield. That is what permits preemption to be "implied." An unbroken line of cases so holds. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("a court must find local law pre-empted by federal regulation whenever the 'challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' ") (citations omitted); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) ("traditional preemption analysis . . . requires an actual conflict between state and federal law, *or* a Congressional expression of intent to preempt") (emphasis added); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (state law is "invalid to the extent that it 'actually conflicts with . . . a federal statute' ") (citations omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 146-47 (1963) (only after determining that there is no conflict does court "turn to the question whether Congress has nevertheless ordained that the state regulation shall yield"); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) ("a state statute is void to the extent that it actually conflicts with a valid federal statute"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (Congress' purpose to preempt state law "may be evidenced in several ways" including when "the state policy may produce a result inconsistent with the objective of the federal statute"); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) ("[o]f course, a state statute is void to the extent it conflicts with a federal statute").

Petitioners do not address the "direct conflict" problem, and so err as to its solution. Moreover, Petitioners' proposed solution – imposing a presumption against preemption and therefore requiring an affirmative congressional statement of preemptive intent even where there is a direct conflict – ignores all the authority, writes the Supremacy Clause out of the Constitution, and takes implied preemption out of the law. The Constitution, and this Court's decisions protecting it, forbid that.

B. *De La Cuesta* Is Right On Point.

De la Cuesta holds that a federal regulation permitting due-on-sale clauses in loan instruments preempted a California common law rule prohibiting them, because the California rule prohibited the exercise of the option – took away the "flexibility" – the federal regulation granted:

> *The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances."* 12 CFR § 556.9(f)(1) (1982). Although compliance with both § 545.8-3(f) and the [state] rule may not be "a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43, *the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.*
>
> 458 U.S. at 155 (emphasis added) (footnote omitted).

De la Cuesta governs here. A state common-law rule cannot take away the flexibility provided by a federal

regulation, and cannot prohibit the exercise of a federally granted option. *See also Kalo Brick*, above, 450 U.S. 311, 318 (1981) (state cannot impose common-law damages on one for doing what a federal act "authorized . . . [him] to do"); *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 678 (1983) (state common-law damage action which "threatens to punish . . . [federally] protected conduct" held preempted); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981) (state law which "eliminates one method for calculating pension benefits . . . that is permitted by federal law" held preempted). Indeed, preemption is more clearly called for here than in *de la Cuesta*, because Congress has specifically endorsed the flexibility and option the federal regulation grants. 15 U.S.C. § 1410b. *See Wood* Opposition, pp. 4-5.

Petitioners' new challenge[4] to *de la Cuesta* consists of arguments long ago resolved (and rejected) by this Court. Petitioners do not dispute that their airbag claim would take away the manufacturer's option and flexibility granted by federal law, and punish the federal option's exercise. Instead they argue that *de la Cuesta* concerned different statutes and regulations than this case. Specifically, they say, the Act at issue in *de la Cuesta* did not contain a savings clause, and the regulation there "explicitly state[d] that it is to be governed exclusively by federal law." Petition at 8. In other words, Petitioners argue, if there is a savings clause or no express preemptive statement by the federal regulator, *de la Cuesta's* principle

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[4] *De la Cuesta* was prominent in General Motors' brief below, but Petitioners never cited it, much less argued against its application here.

does not apply, even where state law and federal law conflict.

That is certainly wrong. As to the savings clause, *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), answers the question and holds that a savings clause cannot preserve a state-law claim that directly conflicts with federal law. There, a savings clause provided that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law." The Court held that an existing but conflicting common-law claim was preempted, because a savings clause "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Abilene*, 204 U.S. at 446. *Accord Ouellette*, 479 U.S. at 485, 493-94 (savings clause provided "nothing in this section shall restrict any right which any person . . . may have under common law"; Senate Report said "compliance with . . . Act would not be a defense to a common law action for . . . damages"; conflicting common law claim preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *Kalo Brick*, 450 U.S. at 328-31 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

As to an explicit preemptive statement by a regulator, this is simply another version of Petitioners' thesis that

implied preemption does not exist. *See* pp. 6-8, above. To repeat, federal law preempts conflicting state law by "direct operation of the Supremacy Clause"; there is no need for a regulation expressly to repeat what the Supremacy Clause says. *Brown*, above, 468 U.S. at 501 (1984). *Ouellette, Kalo Brick* and *Abilene* demonstrate that rule, as well. There was no explicit preemptive statement in the regulatory action in any of them; all found implied preemption. Indeed, if anything, this is an *a fortiori* case. In those cases, Congress was silent; here Congress by § 1392(d) expressly preempted non-identical standards, and by § 1410b expressly endorsed the flexibility and seat belt option that this regulation grants.

Petitioners also say the Safety Act authorizes "minimum standards," and that the federal regulatory scheme in *de la Cuesta* did not "provide for minimum federal regulations supplemented by the common law." Petition at 8-9. But the "minimum standards" language in the Safety Act has nothing to do with the common law or preemption. Section 1392(d) preempts all state-law standards that are not "identical" to on-point federal standards, minimum or not. Thus, "although the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law." *Wood*, 865 F.2d at 414. *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (federal Ports and Waterways Safety Act referred to "minimum standards"; Act preempted state standards at issue because "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements"). *See also* 41 Fed.

Reg. 2391, 2392 (1976) (promulgating amendments to FMVSS 105: " 'Minimum' performance standards do not equate with 'minimal' performance standards. . . .The word 'minimum' in the statutory definition of motor vehicle safety standards (15 U.S.C. § 1391(2)), does not refer to the substantive content of the standards but rather to their legal status – that the products covered must not fall short of them.").

Petitioners' arguments against *de la Cuesta* are new and illusory. The court of appeals correctly held that *de la Cuesta* controls. There is no reason to review that decision.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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December 29, 1989

RULE 28.1 LIST OF PARTIES

APPENDIX A

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

Aero Vironment Inc. (USA)

Alambrados Automotrices, S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Applied Intelligence Systems, Inc. (USA)

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DHMS Industries, Ltd. (Korea)

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Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)

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Ilmor Engineering, Ltd. (England)

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